LABOR ORGANIZATIONS AND THE SHERMAN LAW[1]

I assume from the title given to this conference, and the very nature of the discussions which have taken place, that you consider it axiomatic that all combinations must be subject to regulation in the public interest. You recognize as a basic truth the statement of that judge "of great and enduring reputation" that—

> the effort of an individual to disturb this [the social] equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act which would be perfectly innocent, at least in a legal view, when done by an individual.[2]

I observe that you have, however, devoted your thought exclusively to the activities of business combinations. Let me in the brief interval that I may take from your indulgence direct your attention to no less powerful forms of association operating in the same field and affecting no less frequently and seriously the course of trade, and no less effectively, and obviously, the freedom of the trader. I refer to the great combinations of labor, as potent for good or evil as corporate forms of association and coextensive with them in every activity of production, transportation and distribution. Before, however, I ask you to consider their relations to the chief statute regulating the operation of combinations in interstate commerce, let me beg you briefly to observe their magnitude, discipline, and purpose.

The most notable of these organizations in number and extent is the American Federation of Labor, claiming 1,750,000 adult members. It comprises 115 national and international unions composed of 28,000 local unions in 38 states, in each of which the resident locals are united in the form of state federations subor-

[1] A paper read before the Western Economic Society, at Chicago, March 2, 1912.

[2] *Commonwealth* v. *Carlisle*, Judge Gibson, Brightly, N.P. (Pa.) 36.

dinated to the national organization. In 631 cities and communities central labor unions or labor councils exist, comprising the local organizations within the immediate locality, who by this means effectively co-operate in matters of municipal or community interest. In addition to the local unions, which are the constituent elements of the national and international organizations, there are 680 local unions throughout the country organized and chartered directly by the American Federation of Labor and known as federal labor unions.

While possessing local independence, these numerous and powerful units are usually guided and controlled in matters of national interest through the Executive Committee of the American Federation of Labor, either by virtue of constitutional authority or directive resolutions passed by the delegates to the annual national conventions. Thus, through delegated powers of assessment, direction, and suggestion, the Executive Committee, by the levy of a trifling individual tax which is immediately payable by the treasurers of the national and international organizations, and the issuance of a circular appeal, finds at its disposal a vast fund and a disciplined and militant force, unified in thought and action. This systematized multitude includes workmen in every kind of production and many forms of municipal transportation and distribution, as well as every branch of dock labor in lake- and seaports, and seamen on the inland waterways and in the coastwise trade, the latter being affiliated in their turn, or at least co-operating with similar organizations in the transmarine service. Recent events demonstrate that combinations have been and may be formed to secure international action in trade disputes, for the purpose of sympathetically involving the seaport labor of both Europe and America. Another powerful combination unaffiliated with the American Federation of Labor, and essentially different in its methods, is found in our railroad service, in which the great railway brotherhoods comprise in their highly organized, intelligent, and responsible membership perhaps 80 per cent of the operatives of our common carriers. The railway telegraphers, essential to the movement of the railroads, are partially organized, while their commercial brethren, although they have suffered a

temporary check in their effort at organization, are commonly known to be reviving their organization.

Finally, at this very moment, a bill introduced in both the House and Senate,[1] at the solicitation of the American Federation of Labor, provides substantially for the recision of executive orders of Presidents Roosevelt and Taft, and of the Post-Office Department, forbidding the affiliation of government employees with organizations detrimental to the public service. The purpose of this measure, as stated by its proponents, is to authorize the unionization of the civil servants of the government, especially of postal employees and particularly the railway mail clerks, upon whom devolves the necessary and important duty of distributing the mail en route.

I have now sketched in shadowy outlines the bulk of these giant combinations and noted the effort of one of them to establish itself in the field of public employment. You must perceive at a glance that these associations are commensurate in extent with the entire field of production, transportation, distribution, and communication, the four things upon which the maintenance and progress of human intercourse, and, indeed, the circulation of the necessities of life, essentially depend. I will, if you please, concede not only the right but the propriety and even necessity of these organizations and the vast individual and social benefit which, under wise leadership, they may confer. But it is likewise true that, possessing a giant's strength, they may use it like a giant. It is against this contingency that government must provide. We cannot contemplate this colossal force without realizing that, like every accumulation of human power, it is capable of misuse and abuse, against which there is no effectual protection except the regulatory power of public law.

I do not undertake to describe or characterize another type of labor combination professedly socialistic, historically violent, frankly opposed to the existing civil order, and indulging constantly through the lips of inflammatory leaders in libelous and subversive assaults upon established authority. These are recognized enemies of society against which it must sedulously protect

[1] H.R. 5970.

itself. While I do not dwell upon them, yet they cannot be excluded from our thought in considering any proposed modification of the principles of law-controlling combinations, for the forces to which I refer are obviously the first to avail themselves of a breach in the barriers of order. If reputable labor combinations mistakenly seek special exemption from the law, they should remember that the forces of anarchy and disorder would everywhere be the first to avail themselves of the privilege.

But reverting to the organizations I have named, the need of efficient legal control becomes doubly important when we realize, as we must, that chief among their purposes, and the methods by which they are sought to be obtained, are some in conflict with accepted law and others in irreconcilable antagonism with private right. But that I may do entire justice in this regard, let me distinguish the Railway Brotherhood from the American Federation of Labor. The former organization practically abandoned the boycott in 1894 by repealing the famous rule 12, which pledged all of its members not to handle the cars of any railroad with which some division of the Brotherhood might at any time be engaged in a trade dispute. Nor do the members of the Brotherhood refuse to work beside non-members. They rely apparently upon the many substantial advantages of membership to recruit their ranks, and upon the maintenance of a high standard of efficiency and character to secure superior recognition from their employers. But the American Federation of Labor is committed to opposite principles and methods. It declares:

> The immortal Lincoln said: "This country cannot long remain half free and half slave." So say we, that any establishment cannot long remain or be successfully operated part union, part non-union. . . . .
>
> The best interests of the labor movement call for the employment of union workers and discourage in every way, shape, and form the deteriorating effects which follow the recognition of the open shop.[1]

In consonance with this declaration of purpose by the Executive Committee of the American Federation of Labor, Mr. John Mitchell, one of that committee, declared in his authoritative work, *Organized Labor* (p. 283):

[1] *American Federationist*, November, 1903, Executive Committee Circular.

With the rapid extension of trade unions, the tendency is toward the growth of compulsory membership in them, and the time will doubtless come when this compulsion will become as general and will be considered as little of a grievance as the compulsory attendance of children at school.

In contrast with this official creed of compulsion, our greatest court has said:

There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.

For the preservation, exercise, and enjoyment of these rights, the individual citizen as a necessity must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a free man. The right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling when chosen is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.[1]

The Federation of Labor not only thus asserts that the exclusion of the non-unionist from employment is a primary purpose, but it frankly displays its weapons in the very presence of the Supreme Court of the United States. In the famous Danbury Hatters' case,[2] it filed a petition in intervention seeking to become a voluntary defendant, because it believed that a decision against the boycott employed by the Hatters' union

would seriously obstruct and hinder the said American Federation of Labor, petitioner, in carrying out the purposes for which it was organized, and destroy, at least to some extent, its usefulness to its members, and would likewise and in like manner injure said members.

It was further stated:

That the constitution of said American Federation of Labor makes special provision for the prosecution of boycotts when instituted by a constituent or affiliated organization, and "that under the provisions of said constitution, many so-called boycotts have been and several are now being prosecuted."

At the time that petition was filed, the boycott had been declared unlawful and criminal by the Supreme Court, by every inferior federal court, and by every state court of last resort in which it had been made an issue. In the Loewe case, the boycott

[1] Slaughter House Cases, 83 U.S. 36.

[2] *Loewe* v. *Lawler*, 208 U.S.

was condemned under the Sherman act, and this condemnation was reiterated in the recent decision of the same court in the Buck's Stove & Range case.[1] Yet, despite this unbroken line of decisions, the officials of the American Federation of Labor declare on the platform and in their official publications their unalterable determination to continue the boycott as the chief method of executing their avowed purposes.

As I recite these undeniable facts, you must perceive an inevitable collision between the law as it is and this combination as it operates. For at the present moment the principles of national law applicable to the activities of such organizations are those which apply with equal force and effect to every other form of combination operating in the domain of interstate commerce. The combination I describe does not avoid the issue; it meets it with unexampled boldness, and, exerting all the political pressure within its power, asks that Congress shall exempt organizations of labor from the uniform rule of law expressed in the Sherman act. It supports its demands by assertions which possess no little plausibility in the ear of the uninformed.

Labor combinations, the proponents of this legislation urge, should be exempted from the Sherman act for substantially three reasons:

1. Because Congress did not intend to include them within its scope.

2. Even if Congress did, the act has been so interpreted as to threaten the very existence of combinations of labor and to penalize their necessary and proper activities.

3. Such combinations, by the very nature of their purpose and methods, ought to be excluded from an act aimed at monopolies and restraints of trade, for they are neither conducted for profit nor have they capital stock, and they sell not commodities but the physical activities and skill of their members.

The first contention is conclusively answered by the uniform decisions of the courts of the United States, beginning in 1893 and culminating in the famous decision of the Supreme Court in the

[1] 221 U.S. 418.

Danbury Hatters' case, in which that tribunal, confirming the opinions of many district and circuit courts, declared:

> The act made no distinction between classes; it provided that every contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt by legislation organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.

But it may be said[1] in this day when none are too humble to set their judgment up against that of a court, that this is but a technical conclusion of law. I therefore ask you to consider other circumstances that should justify this conclusion, even to the critical lay mind.

Just a few months before Senator Sherman introduced his original bill, the Supreme Court of the United States, in a unanimous decision obtained at the instance of labor organizations themselves, held that a boycott as presented in the case at issue, a combination of workmen to prevent the employment of a fellow-workman, was an indictable conspiracy at the common law and a "heinous" offense.[2] The Sherman act was regarded by its authors as but a translation to the federal jurisdiction of the common law against combinations and conspiracies in restraint of trade and monopolies. The decision to which I refer was familiar to every lawyer in Congress, and what more natural than that the grave offense condemned by the Supreme Court should have been included within the prohibitions of the act?

As further contemporaneous evidence of the intention of Congress, in 1890, let me call your attention to the now generally recognized fact that Senator Edmunds, chairman of the Judiciary Committee of the Senate, was the actual author of the Sherman act, for between the original proposal of the Senator from Ohio and the law which now bears his name there is but an historical relation. His original suggestion, amended out of all recognition, disappeared into the Judiciary Committee of the Senate and emerged therefrom in the hand of Senator Edmunds possessing the identical form of the existing law. Edmunds vigorously opposed every effort to exempt

[1] *Loewe* v. *Lawler*, 208 U.S. 301. [2] *Callan* v. *Wilson*, 127 U.S. 540.

labor combinations from its terms, and long before any court interpreted the act, he made the following statement of its purpose, in this very city, in an interview in the *Chicago Inter-Ocean*, on November 21, 1892:

> It is intended to, and I think it will cover every form of combination that seeks in any way to interfere with and restrain free competition, whether it be capital in the form of trusts, combinations, railroad pools, or agreements, or labor through the form of boycotting organizations that say a man shall not earn his bread unless he joins this or that society. Both are wrong, both are crimes, and indictable under the anti-trust law.

Surely, if the intention of Congress had been defeated by the courts, that body would long since have corrected that miscarriage of purpose, but, on the contrary, it has approved the judicial view by three times refusing passage to amendments to the Sherman act directly or indirectly intended to exempt combinations of labor. One of these efforts possesses unusual significance. In 1900, the House passed the following amendment:

> That nothing in this act shall be so construed as to apply to trade unions or other labor organizations organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is to be performed.

On reaching the Senate, the amendment was referred to the Judiciary Committee of the Senate, of which Senator Hoar was then chairman. He is frequently referred to as one who gave personal assurances that the original act was not intended to include combinations of labor. On February 21, 1901, he discussed the proposed amendment in the Senate, saying:

> There is a further provision that no labor organization or association shall be liable under the act to which this is an addition. I gave, as chairman of the committee, several full hearings to the representatives of the labor organizations of the country who were interested in promoting this legislation and also to the representatives of the great organization, the Brotherhood of Locomotive Engineers, and they agreed with me, all of them, that these objections were well taken and that the legislation ought not to pass.

At the same time he proposed an amendment intended to remove the alleged fear that the act threatened the right of organization itself. His proposal was as follows:

> That nothing in said act shall be so construed as to apply to any action or combination, otherwise lawful, of trade unions or other labor organiza-

tions, so far as such action or combination shall be for the purpose of regulating wages, hours of labor, or other conditions under which labor is performed, without violence or interfering with the lawful rights of any person.

You perceive at a glance the fundamental difference between the House amendment, which is the identical demand of today, and Senator Hoar's proposal, which was not received with enthusiasm then and would not be now, thus demonstrating that those who sought exemption from the law then, like those who seek it now, do not fear that their lawful existence is threatened, but seek to avoid the law's prohibition against methods of whose illegality and immorality they are conscious.

The second contention is, however, far more important than the first, for if the act has been construed so as to threaten the right of organization itself or to embarrass trade unions in the performance of legitimate and proper activities, they would indeed have just cause to complain against it. But I assert, without fear of contradiction, not only that every proper activity of labor combinations has been vindicated in proceedings under the Sherman act, but that I know of no other kind of litigation in which such rights have been so fully and frequently recognized. In 1894, one Phelan, an agent of Eugene Debs during the great strike which commemorates his name, undertook, in combination with others, to coerce the employees of the Cincinnati N. O. & T. P. Ry. Co. into refusing to handle the cars of the Pullman Company, which that road had a contract to haul. In the contempt proceedings which grew out of these acts and in which the Sherman act was construed in its application to the combination disclosed, the judge, now our distinguished President, spoke as follows:

Now, it may be conceded in the outset that the employees of the receiver had the right to organize into or to join a labor union, which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of a single employee may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right

to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in anyone, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employees by 10 per cent, and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court.[1]

About the same time District Judge Speer, upon application of the Brotherhood of Locomotive Engineers, directed a receiver of that court, in charge of the Georgia Central Railroad, to enter into a trade agreement with that union against the receiver's objection.[2] The court condemned, under the Sherman act, a condition of the proffered agreement by which the receiver was asked to consent that the employees be permitted to refuse to handle the cars of any other road with which members of the Brotherhood might be engaged in a trade dispute. In the Debs case, in which the Sherman act was applied by the Circuit Court,[3] the lower court in the first instance, as well as the Supreme Court on appeal, recognized the right of organization and collective action as axiomatic; while in the most recent application of the act to combinations of labor in the Buck's Stove & Range case, the Supreme Court of the United States, while sustaining an injunction against the boycott, approved labor combinations, limiting their activities only by considerations which every reflecting mind must accept. The court says:

> Society itself is an organization and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

[1] *Thomas* v. *Cincinnati*, 62 Fed. 817.

[2] *Waterhouse* v. *Comer*, 55 Fed. 149.

[3] *U.S.* v. *Debs*. 64 Fed. 763.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one.[1]

What, then, have courts condemned, in construing the Sherman act, to which combinations of labor object? They have condemned the boycott, just as by applying the same principles they condemned it when prosecuted by business men in the case of *Montague* v. *Lowry*,[2] where a number of tile dealers combined to prevent the purchase or sale of tiles by any save those who could obtain membership in their organization. They have condemned a combination to prevent the operation of a railroad by the intimidation and coercion of its employees or to cause them concertedly to quit their employment unless the road broke existing contracts with other roads, or a manufacturing corporation engaged in a dispute with its employees to which the railroad in question had no relation.[3] They have condemned a combination to procure the stoppage of all railroad communication throughout the United States by inciting the employees of all the carriers of the country to quit their service without any dissatisfaction with the terms of their employment, in order to paralyze all traffic and thus, through the injury to the carriers and the public, induce pressure to be brought upon a third person, who was unrelated to either the railroads or the public, and who was not even the employer of any members of the combination.[4] They have condemned the combination to procure a strike of every union member in a given city and to intimidate non-union men remaining at work, thus to prevent the movement of any commerce through that city until

[1] *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418.

[2] 193 U.S. 38.

[3] *Thomas* v. *Cincinnati;* 62 Fed. 817; *U.S.* v. *Debs*, 64 Fed. 724; *U.S.* v. *Agler*, 62 Fed. 824; *U.S.* v. *Elliott*, 64 Fed. 27; *Woodhouse* v. *Comer*, 55 Fed. 149; *U.S.* v. *Cassidy*, 67 Fed. 700.

[4] *Thomas* v. *Cincinnati*, 62 Fed. 817.

a dispute between one set of employers and a particular union was adjusted in accordance with the demands of the combination;[1] and, finally, they have condemned a combination "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."[2]

These are the limitations which the courts of the United States, interpreting the Sherman act, have imposed upon the activities of workmen in combination. Which of these prohibitions is novel? Which of them has not been applied to every form of combination under principles of law recognized and approved by English-speaking people since the memory of man runneth not to the contrary? Which of these prohibitions could now be removed without irreparable injury to private rights and public interest? Which of them could be withdrawn without encouraging the possibility of disorder and, on occasion, producing far-reaching public distress? What right which any organization may exercise with benefit to its members and without prejudice to the essential necessity of maintaining uninterrupted communication between the states and without impairing the constitutional freedom of employer and employee is denied or menaced by any decision under the act? What, in last analysis, do these decisions forbid but the effort of the many, by unlawful means or for an unlawful purpose, to compel the one to do their bidding, "a proceeding outside of the law, in defiance of the law, and in spirit and effect an attempt to strip from one that has that which of right belongs to him—the full and undisturbed use and enjoyment of his own"?[3]

But it is finally urged that by their very nature and methods, by the fact that they are not conducted for profit, and because they dispose of physical energy or skill and not completed commodities, labor organizations ought to be excluded from inhibitions against restraints of trade.

Surely the theory that such combinations of labor cannot be

[1] *U.S.* v. *Workingmen's Amalgamated Council*, 54 Fed. 994, 57 Fed. 85.

[2] *Loewe* v. *Lawler*, 208 U.S. 300.

[3] Mr. Justice Brewer to the American Bar Association, "The Movement of Coercion."

restraints of trade is destroyed by the fact that they frequently have been and are found physically obstructing as well as economically restraining and even preventing the movement of trade and aggressively trespassing upon the liberty of the trader. Nor is the possession of capital stock or the conduct of an organization for profit any standard by which to determine the capacity of a combination to stop the movement of commerce. From the Debs strike to the McNamara conspiracy, it has again and again been practically demonstrated that the most potent force to disrupt communication between cities and states, essential not only to the continued employment of labor but to the transmission and diffusion of the necessities of life, is a voluntary combination of men absolutely devoted to a single purpose—the interruption of commercial intercourse by any means their ingenuity devises or their courage risks until the demands of the combination are conceded.

What possession of man has ever been privileged to be the instrument of illegal action, whether he use his land or his chattel, his tongue or his hand, the skill of his body, the cunning of his thought, his physical energy, or his material possessions, to evade the law or to violate it? No possession of the lawless is or should be beyond the condemnation of the law or the reach of its executors. The giving or withholding of the physical energy of man to work unlawful injury to others is and must be condemned as strongly as the giving or withholding of any external possession for the same purpose.

Let it be granted that the combination of labor is an association of human energy lawfully to protect the conditions of its disposal by concerted action: so long as it possesses and exercises the power to work harm, public and private interest demands protection against its possible action.

> No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law.[1]

[1] *Aikens* v. *Wisconsin*, 195 U.S. 194, Mr. Justice Holmes.

Whether you approve or disapprove of the Sherman act in its present form, you must recognize that its purpose, and more than that, the very object of the constitutional power from which it springs, is effectually to protect trade and transportation between the states, and the persons engaged therein, with a shield of national power. To attain this end, the law must provide against every source of attack and every kind of an assailant. It must meet all comers at every point. To preserve the freedom of interstate commerce, it must regulate every form of combination possessing the power or intention to trespass upon it. It makes no difference whether it be threatened with obstructions physical or economic, a mob, a monopoly, or a sandbank, an association of individuals or the solemn enactments of a sovereign state, against every subterfuge the wit of man can devise, against every force the power of man can employ, it is no less the right than the duty of Congress to protect intercourse between the states.

JAMES A. EMERY

WASHINGTON, D.C.